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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

SHONG-CHING TONG,

Petitioner

v.

PAUL TURNER, COLEMAN A. SWART, PHILIP M. SAETA, DANIEL P. POTTER, LOS ANGELES COUNTY, STATE OF CALIFORNIA,

Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

SUPPIEMENTAL APPENDIX

Shong-Ching Tong
1741 Phillips Dr.
Pomona, CA 91766
(909) 622-6884

Petitioner Pro Se

32PP

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SHONG-CHING TONG Plaintiff, v. PAUL TURNER aka PAUL ARTHUR TURNER, et al., Defendants.	)	Civil No. CV 95-7196-RMT (Mc) FIELD, CLERK, U.S. DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA FEB 1, 1996

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE IN A CIVIL RIGHTS CASE

This Report and Recommendation is submitted to the Honorable Robert M. Takasugi, United States District Judge, pursuant to the provisions of 28 U.S.C. section 636(b)(1)(B) and General Order 194 of the United States District Court for the Central District of California.

BACKGROUND

The pro se plaintiff filed this civil rights action on October 24, 1995

against: (1) Justice Paul Turner of the California Court of Appeals; (2) Los Angeles Superior Court Judge Coleman A. Swart; (3) Daniel P. Potter, Chief Depu -ty of the Clerk's Office of the Califor -nia Court of Appeal, Second Appellate District; (4) Philip M. Saeta, a retired state court judge; (5) the State of Cali -fornia; and (6) the County of Los Angel -es. The plaintiff challenges certain rulings in a state court lawsuit in which the plaintiff was a party and a person named Stephen Law was an opposing party. Defendant Judge Swart allegedly referred a motion for sanctions filed by the plaintiff to defendant Saeta, who acted as a discovery referee. The plaintiff alleges that defendant Saeta issued a report which ruled against Stephen Law but which falsely reported the time spent hearing the motion. The plaintiff claims

that judge Swart approved Saeta's report. Defendant Swart thereafter allegedly refused to have Stephen Law declared vexatious and generally refused to compel Law to comply with discovery. Defendant Sawrt allegedly granted Law's motion to require the plaintiff to post security, even though Swart allegedly knew that Law had been declared vexatious by another judge.

The plaintiff alleges that he unsuccessfully attempted to have judge Swart disqualified and recused on the ground that judge Swart had discriminat -ed against the plaintiff "as a disabled person and of Chinese origin." The plaintiff claims that defendant Swart "failed to pursue the perjuries committ -ed by Stephen Law," unlawfully denied the plaintiff's motion to disqualify,. and thereafter wrongfully dismissed the

plaintiff's complaint. The plaintiff allegedly thereafter filed a petition for awrit of mandate with the California Court of Appeal. Defendant Potter alleg-edly returned the petition, telling plaintiff to file an "Application for pre-filing order." The plaintiff claims that he resubmitted his petition with the application, but that defendant jus-tice Turner unlawfully dismissed the petition on the ground that it was unti-mely. The California Supreme Court allegedly denied the plaintiff's petition for review.

The complaint contains five "counts-." Count 1 asserts a claim for violation of the First, Fifth, and Fourteenth Amendments and the California Constitution against all defendants. Count 2 purportes to be a claim for discrimination on account of national origin and

disbaility discrimination. Counts 3, 4 and 5 are state law claims for abuse of process and intentional and negligent infliction of emotional distress. In th prayer of his complaint, the plaintiff seeks unspecified general, special and punitive damages. However, in the body of his discrimination claim, the plaintiff also purportes to seek "all benefits" to which he would have been entitled in the absence of the discrimi-nation, and a permant injunction restra-ining the defendants from engaging in "similar" unlawful practices.

On Novemver 15, 1995, defendants Turner, Potter and State of California filed a motion to dismiss on the grounds that the court lacks jurisdiction over the subject matter and the complaint fails to state a claim upon which relief can be granted. Also on November 15,

1995, defendants Swart, Saeta and County of Los Angeles filed a motion to dismiss on the same grounds. On December 11, 1995, the plaintiff filed an opposition, accompanied by a request for judicial notice of various documents, including documents or portions of documents from the state court proceedings, correspondence, and documents from otherlegal proceedings whose relationship to the present action is obscure. On December 15, 1995, the plaintiff filed a motion to disqualify the magistrate judge. In accordance with Section 4.0 and 9.0 of General Order 224, all proceedings were stayed pending the determination of this motion. On January 26, 1996, the distri-ct court denied the motion to disquali-fy.

DISCUSSION

For the reasons discussed below, the

court should dismiss the federal claims with prejudice as against all defendant -s. The court should decline to exerci -se supplemental jurisdiction over the state law claims, and those claims should be dismissed without prejudice.

I. The Court Has No Subject Matter Jurisdiction Over Claims Attacking the Validity of State Court Decisions.

It is apparent that this action is a vehicle by which the plaintiff seeks district court review of the validity of state court orders. A United States District Court, as a court of original jurisdiction, has no authority to review the final determination of a state court made in judicial proceedings. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476, 103 S.Ct. 1303, 75 L. Ed.2d 206 (1983); Branson v. Nott, 62 F.3d 287, 291 (9th Cir.), cert. denied,

___U.S.___, 116 S.Ct. 565 (1995). Under the Feldman doctrine, the proper court in which to obtain such a review is the United States Supreme Court, by petition for writ of certiorari. District of Columbia Court of Appeals v. Feldman, 460 U.S. at 476; 28 U.S.C. Section 1257. "This is true even when the challenge to a state court decision involves federal constitutional issues." Branson v. Nott, 62 F.3d at 291. The claims against jus-tice Turner, judge Swart, and retired judge Saeta must be dismissed without leave to amend. See MacKay v. Pfeil, 827 F.2d 540, 543 (9th Cir. 1987) (Dismissal appropriate where subject matter jurisdiction is lacking under Feldman doctrine).

Application of the Feldman doctrine compels the conclusion that the claim against defendant Potter must also be

dismissed. The plaintiff asserts that he was wronged by Potter's return of the plaintiff's petition for review because the plaintiff had not submitted an "app-lication for pre-filing order." Compl-aint, Para. 25. The plaintiff alleges that he thereafter submitted the peti-tion with the application, and that def-endant Turner denied the petition on the ground that it was untimely. Comp-laint, Para. 27. the complaint thus suggests that the plaintiff wasa harmed by a delay caused by defendant Potter.

The court takes judicial notice, pursuant to Fed.R.Evid. 201, of the contents of Exhibit 6, p. 27 of Exhibit-s, to the plaintiff's opposition, con-sisting of a one-page order issued by defendant Turner denying the plaintiff's request for permission to file his peti-tion not only on the ground that the

petition was untimely, but also on the ground that it had no merit and had been filed for harassment purposes. The claim against Potter is simply part and parcel of the plaintiff's attempt to gain review in this court of the orders of the state Court of Appeal. This court lacks jurisdiction to review the decision of the state Court of Appeal.

II. Defendants Turner, Swart, Saeta and Potter Are Shielded by Absolute Judicial Immunity.

Judges are absolutely immune from suits for money damages for acts perform -ed in their judicial capacities. Mireles v. Waco, 502 U.S. 9, 9, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991) (per curiam). Judicial acts are those involving the " ' performance of the function of resolving disputes between the parties, or of auth -oritatively adjudicating private rights

___U.S.___, 113 S.Ct. 2167, 2171, 124 L.Ed.2d 391 (1993) (citation omitted); see Atkinson v-Baker & Associates v. Kolts, 7 F.3d 1452, 1454 (9th Cir. 1993). Judicial Immunity applies " 'however erroneous the act may have been, and how-ever injurious in its consequences it may have proved to the plaintiff.' " Cleavinger v. Saxner, 474 U.S. 193, 199-200, 106 S.Ct. 496, 88 L.Ed.2d 507 (1985) (citation omitted); see Ashelman v. Pope, 793 F.2d 1072, 1075 (9th Cir. 1996) (en banc). Furthermore, "judicial immunity is not overcome by allegations of bad faith or malice." Mireles v. Waco, 502 U.S. at 11. A judge is subject liability only when: 1) the challenged action was not taken in the judge's judicial capacity, or 2) the challenged action was talen in the absence of all

jurisdiction. Id. at 11-12.

All of the alleged wrongful acts of defendants Turner and Swart occurred while they were acting in their judicial capacities presiding over matters before them over which they had jurisdiction. see Franceschi v. Schartz, 57 F.3d 828 8300831 (9th Cir. 1995) (municipal court commissioner immune from civil rights liability for issuing bench warrant and ordering plaintiff into custody after discovering plaintiff had driven himself to traffic hearing with suspended licen -se). The plaintiff argues that defendant Saeta was a "paid discovery referee, not a judicial officer." Plaintiff's Memorandum of Points and Authorities in Opposition to Motions to Dismiss, p. 8. Defendant Saeta was acting in a judicial capacity in rendering his decision and report. see Atkinson-Baker & Associates

v. Kolts, 7 F.3d 1452, 1454 (9th Cir. 1993) (acts of court-appointed special master committed within judicial capaci-ty). Therefore he too is protected by judicial immunity.

The court take judicial notice of the fact that the plaintiff had been declared a vexatious litigant in state court at the time of these events, and was subject to pre-filing review.[1] The

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[1] Los Angeles County Superior Court case No. VC 006762, October 20, 1993 Minute Order.

act of defendant Potter in refusing the plaintiff's petition because it was un-accompanied by an application for a pre-filing order was done in order to enfor-ce the state court's prior order for pre-filing review. Defendant Potter is absolutely immune from liability for enforcing the state court pre-filing

order. see Coverdell v. Dep't of Social and Health Services, 834 F.2d 758 (9th Cir. 1987); Kincaid v. Vail, 969 F.2d 594, 600-601 (7th Cir. 1992), cert. deni-ed, ___U.S.___, 113 S.Ct. 1002, 122 L. Ed.2d 152 (1993) (court clerk absolutely immune for acts done at judicial direction; canvassing cases).

The defendants' immunity extends to the discrimination allegations contained in count 2 against defendants Turner, Potter and Swart. The alleged "discriminatory" acts which form the basis for the plaintiff's claim under Title II of the Civil Rights Act of 1964, 42 U.S.C. Section 2000a, are "continuances of rulings" by defendant Swart, the return of the plaintiff's petition by defendants Turner and Potter, and Turner's dismissal of the plaintiff's petition. Compl-aint, Paras 51, 52. All of these acts

are within the scope of the judicial immunity enjoyed by these defendants.[2]

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[2] In the first paragraph of his compl-aint, the plaintiff states that he brings the action for violation of the Americans with Disabilities Act of 1990. The complaint does not state a claim for violation of the Americans with Disabi-lities Act, which is codified at 42 U.S. C. section 12101 et seg. Count 2 of the complaint alleges a violation of 42 U.S. C. Section 200a, part of Title II of the Civil Rights Act of 1964. Section 2000a prohibits discrimination in public accom-mondations on account of "race, color, religion or national origin." Physical disability is not defined as a protected class. Furthermore, section 2000a(b) does not include a court within the definitions of the places of public accommodation covered by the statute, which covers such establishments as places of lodging, restaurants, theater-s, and the like. Finally, a plaintiff bringing an action under this statute may obtain only injunctive relief, not damages. 42 U.S.C. Section 2000a-3(a), Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402, 88 S.Ct. 964, 19 L.Ed. 2d 1263 (1968). Thus the complaint does state a Title II claim. In any event, the defendants would be shielded by judicial immunity from liability for money damages even if the plaintiff had pleaded an ADA claim against them. To the extent that the body of the complaint contains a request for injunctive relief against "similar" state court orders,

such relief would run afoul of the Feldman doctrine prohibiting review of any such "similar" orders of these defen -dants.

III. The Complaint Fails to State a Federal Claim Against the County of Los Angeles.

A governmental entity such as the County of Los Angeles cannot be held liable under 42 U.S.C. section 1983 on a theory of respondeat superior. Polk County v. Dodson, 454 U.S. 312, 325, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981); Meehan v. County of Los Angeles, 856 F.2d 102, 106-107 (9th Cir. 1988). The Complaint does not identify any defendants as an employee or agent of the county. Justices of the Court of Appeal and Superior Court judges are members of the judiciary, not County employees. see Cal. Const. Art. 6, Secs. 1, 3, 4.

The plaintiff alleges that in the

state court lawsuit, "there are many documents were (sic) missing" Complaint, Para. 38. The plaintiff claims the Coun-ty has a "duty to safe keep all court papers filed." Id. The complaint alleges no county policy, custom or usage the application of which has caused harm to the plaintiff. see Gillette v. Delmore, 979 F.2d 1342, 1346 (9th Cir. 1992), cert. denied, 114 S.Ct. 345, 126 L.Ed 310 (1993). Accordingly, the plaintiff fails to allege how he was harmed by the alleged loss of the documents, or how the alleged loss violated any constitu-tional right. The complaint fails to to state a claim against the County.

VI. Jurisdiction Over the Supplemen-tal State Law Claims Is Inappropriate.

A federal court may decline to exer-cise supplemental jurisdiction over state law claims where it has dismissed

all claims over which it has original jurisdiction. 28 U.S.C. Sec 1367(c)(3); O'Connor v. State of Neveda, 27 F.2d 357 363 (9th Cir. 1994). cert. denied, ___ U.S.___, 115 S.Ct. 1367, 131 L.Ed.2d 223 (1995). "(I)n the usual case in which federal-law claims are eliminated before trial, the balance of the factors of economy, convenience, fairness, and comity will point toward declining to exercise jurisdiction over the remaining state-law claims." Id. (Internal quotations omitted). In this action, all of the federal claims upon which this cour -t's jurisdiction is grounded must be dismissed. The lawsuit is still at the pleading stage, and defendants have not yet filed answers to the complaint.

Considerations of economy, convenience, fairness and comity compel the conclusion that the supplemental jurisdiction should

not be exercised over the state law claims.[3]

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[3] The plaintiff has invoked the jurisdiction of this court to assert supplemental state law claims against California defendants whom he could not sue in state court without a pre-filing order. The current docket of this court lists a number of cases filed by the plaintiff in the last several years against state judges and other state and government officials. It may well be appropriate under these circumstances to decline supplemental jurisdiction under 28 U.S.C. Section 1367(c)(4), which provides that in "exceptional circumstances, jurisdiction may be declined for "compelling reasons." In light of the court's conclusion that supplemental jurisdiction should be declined under 28 U.S.C. Sec. 1367(c)(3), the court need not and does not reach this issue at this time.

CONCLUSION

A complaint filed pro se may only be dismissed without leave to amend where "it is absolutely clear that the deficiencies of the complaint could not be cured by amendment." Karim-Panahi v. Los Angeles Police Department, 839 F.2d 621, 623 (9th Cir. 1988) (citations and quota

-tions omitted); Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, L.Ed. 2d 80, 84 (1957) (dismissal with prejudice appropriate where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief"). The court has no jurisdiction to review state court orders. The State of California is immune from suit. The plaintiff has stated no claim against the County of Los Angeles, or any county employees. All of the indi-vidul defendants in this action are abso-lutely immune from suit. In these circumstances, the deficiencies of the complaint cannot be cured by amendment, and the entire action should be dismissed with prejudice as to the federal claims, and without prejudice as to the supplemental state law claims.

RECOMMENDATION

For the reasons stated above, the magistrate judge recommends that the Court issue an order: (1) approving and adopting this Report and Recommendation; (2) dismis -ing the complaint and the entire action with prejudice as all federal claims; and (3) dismissing the complaint and the entire action without prejudice as to the supplemental state law claims.

DATED: February 1, 1996.

James W. McMahon
United States Magistrate Judge

Shong-Ching Tong
1741 Phillips Dr.
Pomona, CA 91766

(909) 622-6884

Plaintiff Pro Se

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SHONG-CHING TONG, Plaintiff, vs. PAUL TURNER aka PAUL TRTHUR TURNER) COLEMAN A. SWART,) PHILIP M. SAETA, DANIEL POTTER, Individually, COUNTY OF LOS ANGELES, THE STAE) OF CALIFORNIA Defendants.	CASE NO. CV 95-7196-RMT (Mc) PLAINTIFF'S OBJECTION TO MAGISTRATE JUDGE'S REPORT AND RECOMMEN-DATION AND THE PROPOS ED JUDGMENTR; MEMORAN -DUM OF POINTS AND AUTHORITIES AND DECLA RATION OF SHONG-CHING TONG IN SUPPORT OF PLAINTIFF'S OBJECTION FILED 96FEB 29 AM 10: 19 CLERK, U. S. DISTRICT COURT, CENTRAL DIST. OF CALIFORNIA

COMES NOW, the Plaintiff Shong-Ching Tong ("Plaintiff") and submits the following Memorandum of Points and Authorities and Declaration of Shong-Ching Tong

in support of plaintiff's objection to Magistrate Judge's Report and Recommendation and the Proposed Judgment.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

This is a case involving defendants' violations of civil rights of plaintiff under constitutions of the United States and the State of California, Americans with Disabilities Act of 1990, and abuse of process, etc..

Because the Magistrate Judge's igno -rance of the evidence and facts in the instant case, plaintiff hereby submits his objection to Magistrate Judge's Report and Rcommendation.

II.

DEFENDANTS HAD FORFEITED THEIR IMMUNITIES BECAUSE THEY HAD ACTED

WITHOUT JURISDICTION

In Owen v. City of Independence, Mo., et al. 445 U.S. 621, 100 S.Ct. 2979, the U. S. Supreme Court held that:

> "Civil Rights Act, by its terms, creates a species of tort liability that on its face admits of no immun -ities; its language is absolute and unqualified, and no mention is made of any privileges, immunities, or defenses that may be asserted; rather, it imposes liability upon 'every person', who, under color of state law or custom, 'subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.'"
> U.S.C.A.Const. Amend. 14.

> "The purpose of the Act (is) to provide protection to those persons wronged by the abuse of government authority and to deter future constitutional violations . . . ."

The U. S. Supreme Court further held that:

> "Section 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as deterrent against future constitu -tional deprivations, as well."

In Monroe v. Pape 365 U.S. at 184, 81 S.Ct. at 482, the U.S. Supreme Court held that:

> "The central aim of the Civil Rights Act was to provide protection to those persons wronged by the misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law (quoting United States v. Classic, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed. 1386 (1941)). By creating an express federal remedy, Congress sought to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority or misuse it."

The Supreme Court further held that:

> "The question with which we now deal is the narrower one of whether Congress, in enacting Section 1979, meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position (Citations Omitted). We conclude that it did so intend."

Mr. Justice BRENNAN of the United States Supreme Court had stated in Adickes v. Kres & Co. 398 U.S. 144, 190, 90 S.Ct. 1598, 1620, 26 L.Ed.2d 142 (1970):

"How 'uniquely amiss' it would be, therefore, if the government itself - 'the social organ to which all in our society look for promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct' - were permitted to disavow liabili -ty for the injury it has begotten."

In Stump v. Sparkman 435 U.S. 349, 55 L.Ed.2d 331, 98 S.Ct. 1099, Mr. Justice STEWART of the U. S. Supreme Court, in his dissenting opinion, had stated "A judge is not free, like a loose cannon, to inflict indiscriminate damage whenever he announces that he is acting in his judicial capacity.

In Pierson v. Ray 87 S.Ct. 1213, 1220, Mr. Justice DOUGLAS, in his dissent -ing opinion, had stated, or quoted, that:

"Congress intended to provide a remedy for the wrongs being perpetrated."

"The Courts are in many instances under the control of those who are wholly inimical to the impartial administration of law and equity."

"There had been a complete breakdown

in the administration of justice in certain States and laws nondiscrimi -natory on their face were being applied in a discriminatory manner." @ p. 1221

"The section's purposes was to provide redress for the deprivation of civil rights. It was recognized that certain members of the judiciary were instruments of oppression and were partially responsible for the wrongs to be remeded . . . . Some State Courts have been instruments of sup -pression of civil rights . . . ; but the wrong to be remeded still exists." @ p. 1222

"I cannot believe that judges * * * would fail to discharge their duty faithfully and fearlessly according to their oaths and consciences." @ p. 1223

In Crooks v. Maynard (9th Cir. 1990) 913 F.2d 699, the Court held that:

"Mere fact that he is judge does not mean defendant has absolute immuni -ty; absolute immunity only applies to judicial acts and not to adminis -trative functions."

In plaintiff's complaint, plaintiff sought damages caused by defendants' violations of plaintiff's civil rights and the Americans with Disabilities Act

when the Statutes' languages are plain and clear. Therefore, the Magistrate Judge's findings of fact and conclusions of law were erroneous and should be denied.

III.

DEFENDANTS HAD ABUSED THE PROCESS

As copies of documents contained in Exhibit b filed herein demonstrate defen-dants had abused the judicial process as complained in the instant case.

Since defendants had abused the judicial process, the "Report and Recommendation" filed by the Magistrate Judge in the instant case is erroneous and, therefore, should be denied.

IV.

CONCLUSION

The Magistrate Judge's Report and Recommendation should be denied because his Report had ignored the fact and

evidence and the Statutes which showing that defendants had violated plaintiff's civil rights under the Constitutions of the United States and the State of California and the ADA and had abused the judicial process.

Further, Defendants had forfeited their immunities when they failed to comply with elementary principles of procedural due process and equal protection under the law and their acts and conduct were malicious, wanton, oppressive, intentional, and unlawful. The Exhibits have proved defendants' malici-ous, wanton, oppressive, and unlawful conduct and acts as alleged.

DATED: February 28, 1996

Shong-Ching Tong,
Plaintiff Pro se

DECLARATION OF SHONG-CHING TONG

I, SHONG-CHING TONG, declare:

1. Declarant is the plaintiff in the instant case and is familiar with the facts in this case and, if called upon to testify, could and would testify competently and from personal knowledge as to matters stated within this declaration.

2. In order for the court to review allegations contained in the complaint are true, declarant requests the court take judicial notice on all Exhibits attached to plaintiff's Objection filed concurrently herewith:

a. Motion of Peremptory Challenge, filed by Stephen Law.

b. Peremptory Challenge, etc., filed by Shong-Ching Tong.

c. Peremptory Challenge, etc., filed by Yei-Hwei Tong.

d. Notice of Motion and Motion to recuse judge Coleman A. Swart, etc., 8/8/94 (2 pages).

e. Defendant Denial P. Potter's letter, 9/30/94.

f. Cover Page, Petition for writ of mandate/prohibition, case no. B086884, 9/26/94.

g. Cover Page, Petition for writ of mandate/prohibition, case no. B087396, 10/12/94.

h. Order, case no. B087396, 10/13/94 by defendant Turner.

i. Cover Pages, Appellant's Opening Brief, Appellant's Reply Brief, Notice of Oral Argument, Case No. B086859, 11/28/94, 1/19/95, 10/26/95.

I declare under penalty of perjury of laws of California that the foregoing is true and correct, and that this declaration is executed on this 28th day of February, 1996 at Pomona, California.

_____

Shong-Ching Tong